UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1994/26
13 June 1994

ENGLISH
Original: ENGLISH/FRENCH/
SPANISH/ARABIC

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-sixth session
Item 10 (d) of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: THE RIGHT TO A FAIR TRIAL

Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/26

CONTENTS

		Page
Introduction		3
I.	COMMENTS RECEIVED FROM STATES	4
A.	Croatia	4
B.	Denmark	4
C.	Egypt	6
D.	Kyrgyzstan	6
E.	Libyan Arab Jamahiriya	7
F.	Namibia	7
G.	Netherlands	8
H.	Saudi Arabia	9
I.	Spain	9
J.	Yugoslavia	12

GE.94-12962 (E)

CONTENTS (continued)

		Page
II.	COMMENTS SUBMITTED BY UNITED NATIONS BODIES AND INTERGOVERNMENTAL ORGANIZATIONS	13
	A. Human Rights Committee	13
	B. International Committee of the Red Cross	13
III.	COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATIONS	16
	Procedural Aspects of International Law Institute	16

Introduction

1. In its resolution 1993/26, entitled "The right to a fair trial", the Sub-Commission on Prevention of Discrimination and Protection of Minorities, inter alia, expressed its appreciation to the Special Rapporteurs, Mr. Stanislav Chernichenko an Mr. William Treat, for their progress report (E/CN.4/Sub.2/1993/24 and Add.1-2), summarizing material regarding national practices on the right to a fair trial and appending a preliminary draft of a third optional protocol to the International Covenant on Civil and Political Rights.

2. In paragraph 4 of resolution 1993/26, the Sub-Commission requested the Secretary-General to transmit the draft third optional protocol to Governments, non-governmental organizations and the Human Rights Committee for written comments and suggestions.

3. Pursuant to that resolution, the Secretary-General, on 12 October 1993, addressed requests to Governments, non-governmental organizations and the Human Rights Committee for comments and suggestions on the proposed draft third optional protocol to the International Covenant on Civil and Political Rights, as contained in document E/CN.4/Sub.2/1993/24, annex II.

4. By 1 June 1994, replies had been received from the following States: Croatia, Denmark, Egypt, Kyrgyzstan, Libyan Arab Jamahiriya, Namibia, Netherlands, Saudi Arabia, Spain and Yugoslavia.

5. Comments were submitted by the Human Rights Committee and the International Committee of the Red Cross.

6. Replies were also received from the International Association of Juvenile and Family Court Magistrates, the Latin American Human Rights Association, the Procedural Aspects of International Law Institute and Service Peace and Justice in Latin America.

7. The present report contains a summary of the substantive replies received. Any additional replies will be reproduced in addenda to the present document.

8. In its decision 1994/107 of 4 March 1994, the Commission on Human Rights decided, inter alia, to consider at its fifty-first session the final report of the Special Rapporteurs including, if appropriate, the desirability of a third optional protocol to the International Covenant on Civil and Political Rights, aimed at guaranteeing under all circumstances the right to a fair trial and a remedy, taking into account the consideration of the Sub-Commission thereon at its forty-sixth session.

I. COMMENTS RECEIVED FROM STATES

A. Croatia

[Original: English]
[20 December 1993]

1. The Republic of Croatia appreciates the efforts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to strengthen the right to a fair trial and the right to an effective remedy against arbitrary or prolonged detention. The Republic of Croatia strongly supports the idea of incorporating all rights envisaged in article 14 to pre-trial procedure, because it might impact the fair administration of justice. The Republic of Croatia would like to emphasize the need to envisage explicitly the right of access to court and of access to lawyers and interpreters, especially in pre-trial detention, in international instruments on human rights.

2. Concerning the draft third optional protocol to the International Covenant on Civil and Political Rights, the Republic of Croatia suggests that the possibility of making reservations should not be completely eliminated. It is important to point out that the reason for such a proposal is the fact that the legal systems of most States parties to the Covenant do not envisage fundamental procedural guarantees as regulated in article 14 of the Covenant. It is possible, if no reservation is admissible to the Protocol, that it would be accepted by a very small number of States parties to the Covenant. By giving the possibility to States parties to make at least some reservations, the Republic of Croatia is of the opinion that the Protocol would acquire wider acceptance.

B. Denmark

[Original: English]
[25 February 1994]

1. The Danish Government attaches great importance to the right to a fair trial. In that light, the Danish Government welcomes the impressive and comprehensive work of the rapporteurs Mr. Stanislav Chernichenko and Mr. William Treat contained in document E/CN.4/Sub.2/1993/24.

2. As far as the draft optional protocol is concerned, the Danish Government would, however, like to point to the fact that there is a distinctive difference between the rights mentioned in the International Covenant on Civil and Political Rights, article 9 (3) and 9 (4) and the rights mentioned in article 14.

3. The rights protected in article 9 (3) and (4) are central and protect fundamental human rights. For that reason, it would be a very significant step forward if these rights were made non-derogable.

4. The rights mentioned in article 14, however, are not all of the same fundamental nature and in the opinion of the Danish Government, a distinction

should be made between the different rights mentioned in article 14. Subsequently, this question, which will need further reflection, should be examined in detail, either by the Special Rapporteurs or by experts from the Contracting Parties.

5. As examples of rights mentioned in article 14 which are of a fundamental nature and which should therefore be made non-derogable, the Danish Government would mention the first part of article 14 (1) concerning the right to a fair trial, article 14 (2) and article 14 (3) concerning the assumption of innocence and the minimum rights of a person charged with a criminal offence, and article 14 (4) concerning the obligation to take into account the accused's young age in cases involving juvenile persons.

6. As examples of rights mentioned in article 14 which are of a less fundamental character and which might, therefore, be excluded from the optional protocol, the Danish Government would mention the following provisions:

- The second part of article 14 (1) concerning the conditions for limiting the publicity of the court proceedings.

7. The right to have a public trial is not seen by all persons charged with a criminal offence as a guarantee in their favour as the press coverage of a trial can be viewed as a punishment in itself. The question is, therefore, if it is advisable to exclude a contracting State from restricting publicity in other situations than those mentioned in article 14 (1), for example in order to take the interests of the accused and/or the victim into account.

- Article 14 (5) concerning the right of a person who has been convicted of a crime to have his conviction reviewed.

8. The right for an accused to appeal against a conviction is undoubtedly a fundamental right in most situations. This does not mean, however, that this right should never be limited.

9. In this connection, the Danish Government would like to refer to Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms, which makes it possible for a contracting State to restrict the right to appeal in the following situations: offences of a minor character, cases where the person concerned was tried in the first instance by the highest tribunal, and cases where a person was convicted following an appeal against acquittal.

10. In the opinion of the Danish Government a limited possibility to restrict a convicted person's possibility to appeal is desirable in the interests of justice, as an unrestricted right to appeal might very likely lead to delays in the criminal justice system.

11. For constitutional reasons, it will not be possible for the Danish Government to ratify a protocol whereby the right to appeal in all cases is non-derogable, as charges against Government ministers relating to their duties are tried in the first instance before the highest court.

Article 14 (7) stating that a person shall not be liable to be tried or punished again for an offence for which he has been finally convicted or acquitted.

12. In exceptional circumstances, for example where the course of justice has been perverted by false statements by witnesses or where evidence only came into the possession of the police after the trial, there is a need for the possibility to have a new trial.

13. In this connection, the Danish Government would like to refer to article 4, paragraph 2, of Protocol No. 7 to the European Convention on Human Rights and Fundamental Freedoms, where it is stated that a re-opening of a cases shall not be prevented in situations where there is evidence of new or newly discovered facts or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case.

C. Egypt

[Original: Arabic]
[20 December 1993]

1. The draft protocol amounts to an amendment of the Covenant, since its purpose is to add article 9, paragraphs 3 and 4, and article 14 to the list of provisions which may not be derogated from under article 4 of the Covenant.

2. The amendment constituted by the draft optional protocol is so designed that, pursuant to the provisions of the protocol itself, it is impossible for States wishing to accede to it to enter reservations. On general grounds Egypt cannot accept that States should not have the possibility of entering reservations and therefore be obliged to choose between accession pure and simple and refusal.

3. If the amendment takes this form, the number of States able to accede to the optional protocol will be small, and its scope and effect will thereby be diminished.

D. Kyrgyzstan

[Original: French/Russian]
[8 December 1993]

The Government of the Republic of Kyrgyzstan is entirely in agreement with the proposed draft protocol. Nevertheless, it wishes to make the following suggestions:

(a) Expand the third preambular paragraph by adding "pursuant to the Covenant";

(b) Redraft the first part of article 10 as follows: "In addition to the notifications made under article 7, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:";

(c) Introduce a separate article on denunciation worded as follows: "Any State Party may denounce the present Protocol at any time by a written notification addressed to the Secretary-General of the United Nations. The denunciation shall enter into force three months after the receipt of such notification by the Secretary-General."

E. Libyan Arab Jamahiriya

[Original: Arabic]
[20 April 1994]

Whereas an examination of the text of the articles contained in the draft protocol clearly shows that the basic purpose of the draft is to add the provisions set forth in article 9, paragraphs 3 and 4, and article 14 of the International Covenant on Civil and Political Rights to the obligations specified in article 4, paragraph 2, of the Covenant so that no State Party to the Covenant can derogate therefrom, as emphasized in article 2 of the Protocol to the Covenant which stipulates that "no reservation is admissible to the present Protocol",

In view of the noble humanitarian aims embodied in the provisions to be added to the Covenant under the third optional protocol in order to promote and strengthen the human rights and fundamental freedoms enjoyed by human beings under the Universal Declaration and the two International Covenants and to provide more safeguards to protect those rights and freedoms within the context of the application of rules of criminal procedure.

Given the congruence and similarity between those provisions contained in article 9, paragraphs 3 and 4, and article 14 of the International Covenant on Civil and Political Rights, from which the provisions of the draft optional protocol permit no derogation, and the principles embodied in the Great Green Document on Human Rights, as well as the provisions set forth in articles 14, 17, 30, 34, 35 and 37 of the Promotion of Freedom Act No. 20 of 1991 and the provisions of the Libyan Code of Criminal Procedure.

Considering the fact that there is no inconsistency between the provisions of the said optional protocol and Libyan legislation concerning the protection of human rights within the framework of the application of the rules of criminal procedure.

The competent authorities in the Jamahiriya have no comments or observations to make in this regard.

F. Namibia

[Original: English]
[14 December 1993]

1. Although Namibia is not a State Party to the International Covenant on Civil and Political Rights, the right to a fair trial is entrenched as a fundamental human right under article 12 of the Namibian Constitution. More importantly, the right to a fair trial has been made non-derogable by

article 24 (3) of the Constitution, even during a state of national defence or declared state of emergency. The relevant part of sub-article (3) reads:

> "Nothing contained in this Article (i.e. on permissible derogations) shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Article(s) ... 12 ... hereof, or the denial of access by any persons to legal practitioners or a Court of law."

So the core provisions of the present draft of the third optional protocol are already a part of the supreme law of Namibia.

2. Namibia threfore fully supports and endorses the present draft as its adoption and implementation will greatly strengthen the protection of the fundamental right to a fair trial.

3. However, it is our view that instead of asking States Parties to report on the measures they have taken to give effect to the third optional protocol, there should be a provision in the present protocol requesting States Parties to take the necessary legislative action to incorporate the non-derogability of the right to a fair trial in their municipal laws.

4. Our second view is that the right to a fair trial should not be restricted to criminal matters but should also be extended to cover civil matters. It is interesting to note that in Namibia, the right to a fair trial is protected both in civil and criminal proceedings under article 12 of the Constitution.

G. Netherlands

[Original: English]
[12 January 1994]

1. The Netherlands Government shares the concern, expressed by the Special Rapporteurs, on the insufficient implementation (and too often flagrant violation) of the rights laid down in articles 9 (3), 9 (4) and 14 of the International Covenant on Civil and Political Rights. These articles are indeed of crucial importance for the realization of the concept of the rule of law in national societies.

2. At the same time, however, the Netherlands Government is not convinced that the proposed draft optional protocol, declaring the above-mentioned rights non-derogable, may adequately contribute to a better implementation of these rights. This position is primarily based on the following considerations.

3. The proposal of the Special Rapporteurs is aimed at giving articles 9 (3), 9 (4) and 14 of the Covenant on Civil and Political Rights in its entirety non-derogable status. In the opinion of the Netherlands Government, this will meet some problems. For this purpose, it might probably be of use to study further the question which elements of these rights can be given non-derogable status. In this respect, reference is made to the relevant articles in the four Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, and in particular to article 75 of Additional

Protocol I, which spells out in detail which elements of articles 9 and 14 of the Covenant are to be considered non-derogable.

4. In addition it may be observed that, as far as article 14 is concerned, the notion of a "fair trial" has gained a broad interpretation and application. This is largely the result of case-law of the Human Rights Committee on this article and of the European Commission and European Court of Human Rights on the comparable article 6 of the European Convention on Human Rights and Fundamental Freedoms. This has led to the result that the standards which have to be fulfilled by States Parties to either treaties to ensure a fair trial are already high and detailed. Notwithstanding this well-developed case-law, these articles contain several phrases which have to be interpreted in the light of the concrete circumstances or which allow for a certain margin of appreciation for the national legislature and/or judge. Reference is made to: "may be excluded", "in special circumstances", "promptly", "without undue delay", "where the interests of justice so require", "will take into account". The same applies to articles 9 (3) and 9 (4) of the Covenant. Although the above-mentioned case-law has to a large extent given a general interpretation of these concepts, the case-law still provides sufficient room for a differentiated application of these concepts in concrete situations and for exceptions to general principles, if circumstances so require. The case-law relating to the interpretation of "undue delay" and the widely differing practice within the States Parties is illustrative in this respect.

H. Saudi Arabia

[Original: English]
[8 November 1993]

1. The right to a fair trial is sanctioned by our Islamic Jurisprudence which is applicable to all residents: native citizens and foreign residents of various nationalities. The said jurisprudence covers all human rights: civil, political, personal and of a collective nature.

2. Our suggestion is for the Centre for Human Rights to make their own studies of Islamic Law and its basic legislative and applicable tenants which a Muslim nation such as Saudi Arabia considers as a Divine law and not a man-made one.

I. Spain

[Original: Spanish]
[15 December 1993]

A. Draft optional protocol

1. Article 4 of the International Covenant on Civil and Political Rights provides that: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination

solely on the ground of race, colour, sex, language, religion or social origin." However, this possibility of derogation is subject to the limitation contained in article 4, paragraph 2, since articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may not be derogated from even in such time of public emergency.

2. The draft third optional protocol to the International Covenant on Civil and Political Rights extends the limitation contained in article 4 of the Covenant by also prohibiting any derogation from article 9 (paras. 3 and 4) or from article 14, even in time of public emergency.

3. Article 9, paragraphs 3 and 4, of the Covenant provide that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful; and article 14 deals with the guarantees available to persons brought before the courts (impartiality of the trial, independence of the tribunal, presumption of innocence, minimum guarantees during the proceedings, etc.).

4. Article 2 of the protocol provides that no reservation is admissible to the protocol. This enhances the integrity of the future optional protocol but will probably prevent the accession of a large number of States. This issue of reservations forces a choice between the principle of the universality and the principle of the integrity of international agreements, the two poles between which the issue always stands.

5. The States parties to the future protocol undertake to submit reports on the measures that they have adopted to give effect to the third protocol, which amounts to extending to the new optional protocol the obligation contained in article 40 of the Covenant.

6. With regard to article 41 of the Covenant, for those States which have made a declaration recognizing the competence of the Human Rights Committee, as referred to in that article, such competence will extend to communications concerning non-fulfilment of the obligations assumed by the States parties to the third protocol, although in this case a statement to the contrary is permitted at the moment of ratification or accession.

7. This same possibility is available to the States parties to the first Optional Protocol which recognize the competence of the Committee to receive and consider communications not only from other States parties but also from individuals concerning non-fulfilment of the obligations laid down in the Covenant.

B. Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950)

8. The rights guaranteed in articles 9 and 14 of the Covenant, which are the subject-matter of the draft optional protocol, have matching provisions in articles 5 and 6 of the Rome Convention, which provide for the rights guaranteed in the Covenant but give them broader treatment and also some other rights not provided for in the Covenant.

9. However, the Rome Convention provides in article 15, paragraph 1, that "In time of war or other public emergency threatening the life of a nation, any High Contracting Party may take measures derogating from its obligations under this Convention ...", thus leaving the way open for possible derogations from articles 5 and 6 referred to above.

C. The Spanish Constitution

10. Article 17 of the Spanish Constitution provides that every person has a right to freedom and security and that nobody may be deprived of his freedom except as laid down in article 17 (time-limit on preventive detention, an arrested person to be informed of his rights and of the reasons for his arrest, right not to be compelled to make a statement, etc.) and in the cases and in the manner provided by the law. This article 17 corresponds to a large extent to article 9 of the International Covenant on Civil and Political Rights.

11. The content of article 14 of the Covenant is in turn reflected in very similar terms in article 24 of the Spanish Constitution, which provides for the right of every person to the effective protection of the judges and courts, to the defence and assistance of a lawyer, to the presumption of innocence and to a trial with full guarantees.

12. However, in connection with article 17 of the Constitution, it must be kept in mind that article 55 of the Constitution allows the possibility of the suspension of the Constitution, for example when a state of emergency or siege is declared. Accordingly, and also taking into consideration article 2 of the draft optional protocol (which prohibits reservations), it must be pointed out that this situation could cause difficulties for Spain when considering accession to or ratification of the protocol.

D. Conclusion

13. The draft third optional protocol in its present wording is designed to extend the prohibition of derogation to the rights contained in articles 9 and 14 of the International Covenant on Civil and Political Rights, thus creating an exception to the rule contained in article 4 of the Covenant, which allows derogation from the rights recognized therein in certain emergency situations. This would be contrary to the Spanish Constitution. Spain would not be able to accede to or ratify a protocol containing such provisions, for article 55 of the Spanish Constitution does permit the suspension of some of those rights (the ones recognized in article 17, which corresponds to article 9 of the Covenant).

14. To sum up, acceptance of the protocol in its present form would be contrary to the Spanish Constitution and, bearing in mind the provision contained in article 95 of the Constitution, such acceptance would require a prior constitutional amendment.

J. Yugoslavia

[Original: English]
[17 March 1994]

1. As regards the draft third optional protocol to the International Covenant on Civil and Political Rights, the Government of the Federal Republic of Yugoslavia has a positive attitude towards the matter regulated therein. Effective protection of human rights requires that the right to a fair trial and the right to complaint in the case of detention should not be limited at all, i.e. that article 9, paragraphs 3 and 4, and article 14 of the International Covenant on Civil and Political Rights should be departed from neither in the case of an officially declared state of emergency nor imminent danger.

2. The new Constitution of the Federal Republic of Yugoslavia regulates certain matters pertaining to human rights in the field of criminal proceedings more precisely than the Constitution of the Socialist Federal Republic of Yugoslavia. Thus for example, new rights are provided in the new Constitution such as the right of the arrested person to be immediately informed of the reasons of arrest in his/her language or the language he/she understands; the right of the arrested person to request that his/her family be informed of his/her arrest; the right to remain silent; the right to a defence counsel; ban of any form of torture, degrading treatment or punishment of the arrested person; ban of re-trial and re-punishment; the right of the defendant to have his/her defence counsel during interrogation.

3. The Constitution of the Federal Republic of Yugoslavia also contains a novelty related to detention. The Constitution draws upon the common democratic tendency that the fundamental right to personal freedom is decided exclusively by a judicial organ. Thus, the supreme act of the country stipulates that citizens can be detained only on the basis of the decision of a competent court and only for the purpose of conducting criminal proceedings. The Yugoslav criminal law, unlike the Constitution of the Socialist Federal Republic of Yugoslavia, does not provide for the possibility of having police organs decide on detention; they are allowed to detain citizens only in the cases provided for by the law and to immediately bring them before the investigating judge. Moreover, detention cannot be determined on the basis of abstract categories such as "security reasons", including the maintenance and/or prevention of disturbance of public law and order, etc.

4. The Constitution of the Federal Republic of Yugoslavia contains another important novelty with respect to the mechanism of the protection of these and other human rights. The rights provided by the Constitution cannot be narrowed or restricted by law, except if the Constitution itself provides for it. The said right to a fair trial contained in the Constitution cannot be narrowed or restricted by any law.

II. COMMENTS SUBMITTED BY UNITED NATIONS AND INTERGOVERNMENTAL ORGANIZATIONS

A. Human Rights Committee

1. As requested by Sub-Commission resolution 1993/26, paragraph 4, the Human Rights Committee has considered the text of a possible draft third optional protocol to the International Covenant on Civil and Political Rights. The Committee wishes to offer the following comments 1/ which are limited essentially to the question of the desirability of drafting a third optional protocol aiming at guaranteeing under all circumstances the right to a fair trial and remedy.

2. The Committee notes that the purpose of the possible draft optional protocol is to add articles 9 (3), 9 (4) and 14 to the list of non-derogable provisions in article 4, paragraph 2, of the Covenant. Based on its experience derived from the consideration of States Parties' reports submitted under article 40 of the Covenant, the Committee wishes to point out that, with respect to articles 9 (3) and (4), the issue of remedies available to individuals during states of emergency has often been discussed. The Committee is satisfied that States Parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in articles 9 (3) and (4) read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States Parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.

3. The Committee is also of the view that it would simply not be feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency. Thus, the inclusion of article 14 as such in the list of non-derogable provisions would not be appropriate.

4. In the light of the foregoing, the Committee considers it inadvisable to pursue the elaboration of a draft optional protocol to the Covenant with the aim of adding articles 9 (3) and (4) as well as article 14 to the list of non-derogable rights enumerated in article 4 (2) of the Covenant.

B. International Committee of the Red Cross

[Original: English]
[17 December 1993]

1. ICRC is well aware of the great importance of the most essential judicial guarantees in order to prevent arbitrary executions and various types of

---

1/ Adopted by the Committee at its 1314th meeting (fiftieth session), on 6 April 1994.

inhuman treatment during situations of emergency. International humanitarian law treaties put a great deal of stress on the judicial guarantees that must be respected, because experience has shown that these are critical for the protection of people during situations of violence. Our experience related to our work in situations of tension not amounting to armed conflicts confirms the same need. We therefore support the wish to make it clear that certain judicial guarantees must be non-derogable.

2. However, we would like to point out that there may be a certain danger in doing this by way of an optional protocol because this may give the impression that the non-derogability of fundamental judicial guarantees is optional. States which do not ratify may well then derogate from these standards arguing that the protocol does not bind them. It may be useful, therefore, to study whether there may be some other way to make it clear that certain essential guarantees are already non-derogable in order to respect in fact the non-derogable character of the right to life and the prohibition of torture and inhuman treatment.

3. It is important that the wording of the optional protocol does not give the impression that it is introducing entirely new law, for States which do not ratify may well derogate from these standards arguing that the protocol does not bind them. An analogy can be drawn here from the 1925 Geneva Gas Protocol the preamble of which indicates that it is confirming the prohibition of the use of chemical weapons as follows:

> "whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilised world; and whereas the prohibition of such use has been declared in treaties to which the majority of Powers of the world are Parties; and to the end that this prohibition shall be universally accepted as a part of international law, binding alike the conscience and practice of nations ..."

4. There is a certain equivalence with regard to essential judicial guarantees in that United Nations reports have shown that these are critical in order to protect the already named non-derogable rights. The public statement on Turkey of 15 December 1992 by the European Committee for the Prevention of Torture makes the same statement. It is therefore a logical deduction to conclude that these are already non-derogable otherwise States are in fact not protecting the non-derogable character of the right to life and the prohibition of torture and inhuman treatment.

5. Another document of importance which is not mentioned in your draft resolutions is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. This resolution was after all adopted by the General Assembly by consensus and clearly applies to all situations, including states of emergency.

6. In the preamble to the optional protocol one could therefore use, mutatis mutandis, the same approach as the preamble to the Geneva Gas Protocol. Possible wording could be as follows:

"Being aware of the fact that the rights that are presently listed as non-derogable in article 4 of the Covenant can only be protected if essential judicial guarantees are respected at all times,

Noting the recognition by all States of the importance of the respect of these guarantees at all times in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and that by virtue of international humanitarian law the respect of judicial guarantees is mandatory in international and non-international armed conflicts,

Also noting that other human rights instruments already list certain judicial guarantees as non-derogable,

Confirm as follow:"

This is, of course provisional wording put forward as a suggestion to be considered.

7. It may be questioned whether "the right to a fair trial and a remedy" is the best title in order to put across the aim of the optional protocol, or whether it may not be more accurate to speak of "the right to essential judicial guarantees", which indicates that the rights protected go further than those relating to the trial on the merits and the remedy of habeas corpus, and that they also encompass other judicial guarantees. The use of the word "essential" would also underline the obligatory nature of the non-derogability of these rights.

8. The rights declared as non-derogable in operative paragraph 1 of the draft optional protocol may be both too wide and too narrow:

Possibly too wide in that the European Court of Human Rights in its judgement in the case of Ireland against the United Kingdom of 1978, and more recently in the case of Branningan and McBride v. the United Kingdom (1993), allowed derogation from the equivalent of article 9 (3) of the Covenant because it was satisfied with the reasons given by the Government for the necessity of the measures and because of the existence of certain safeguards. In the interests of a maximum rate of ratification of the new optional protocol, this point should perhaps be studied with more care;

Possibly too narrow in that certain safeguards, such as promptly informing a lawyer and the family of the whereabouts of an arrested person, are essential for the prevention of disappearances. It may be worthwhile to study in more detail the provisions in the above-mentioned body of principles for the protection of detained persons, and more importantly, the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in December 1992, in order to see whether provisions that appear in these instruments are in fact essential and ought to be accepted as non-derogable. The optional protocol to the International Covenant on Civil and Political Rights does not necessarily have to be tied to the wording of the Covenant but should be able to benefit from progress made since then.

Another document that could be usefully studied in this context is the Turku Declaration of Minimum Humanitarian Standards, which was adopted by a group of experts in December 1990.

9. As the main danger to an optional protocol is that its provisions may be perceived as optional, it could be considered whether a separate treaty may be a better choice, as was done in the case of torture, the basic provisions of which are a confirmation of pre-existing law. Another possibility could be a revision of article 4 of the Covenant itself, although there may be a certain danger in reopening the treaty. Finally, a formal declaration or a consistent interpretation by United Nations bodies of the non-derogable character of certain judicial guarantees would help affirm a customary law to this effect, although widely-ratified treaty law would, of course, be very desirable.

III. COMMENTS SUBMITTED BY NON-GOVERNMENTAL ORGANIZATION^

Procedural Aspects of International Law Institute

[Original: English]
[9 December 1993]

1. The PAIL Institute supports the preliminary draft of the third optional protocol to the International Covenant on Civil and Political Rights. By making articles 9 (3), 9 (4) and 14 non-derogable, the third optional protocol takes an important step toward ensuring that some of the most basic elements of the rule of law remain in place even in times of public emergency. However, the PAIL Institute also urges the Sub-Commission to consider whether article 9 (2) sets forth rights that are prctective of the right to a fair trial, and whether these rights should be made expressly non-derogable by the protocol:

> "Anyone who is arrested shall be promptly informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

2. The observance of article 9 (2) may be a prerequisite to the observance of the habeas corpus-type rights guaranteed under articles 9 (3) and 9 (4). Indeed, experience under the Covenant suggests that article 9 (2) is inseparably linked to the right to a fair trial. In his monograph entitled Rule of Law in a State of Emergency (1989, p. 206), Dr. Chowdhury noted that the Human Rights Committee has called attention to the "due process" role of article 9 (2):

> "In cases where detention is followed by trial, failure to inform the charges under article 14 (3) (a) and failure to inform the reasons for arrest under article 9 (2) ... are usually treated as identical violations of a common obligation."

3. Arguably, inclusion of article 9 (2) in the optional third protocol's enumeration of non-derogable provisions creates no additional obligation regarding a defendant's right to be informed of the charges against him. Nonetheless, the PAIL Institute believes that the inclusion of article 9 (2) clarifies the due process rights accorded by the article 14 "fair trial"

rights. In particular, article 9 (2) ensures that a defendant's right to know the substance of the complaint against him exists as of the time of his arrest, with a formal criminal charge to follow "promptly".

4. Finally, the PAIL Institute wishes to encourage the Special Rapporteurs' further efforts aimed at strengthening the observance of the right to a fair trial. These efforts include the Special Rapporteurs' decision to distil from international interpretations and national laws and practices the common elements of the right to a fair trial and a remedy, and to use these common elements as the basis for a draft declaration. Indeed, a declaration on the right to a fair trial and a remedy is the necessary complement to the third optional protocol. A declaration of the type envisioned by the Special Rapporteurs will provide valuable guidance to Governments seeking to improve the implementation of the rights to a remedy and a fair trial guaranteed under the Covenant, and will underscore the non-derogability of the rights that are the subject of the third optional protocol. In this manner, the work of the Special Rapporteurs represents a significant advance in the international recognition of the right to a fair trial and a remedy, and lays the groundwork for the improved observance of these norms.